

BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

In the Matter of)
)
BALTIMORE GAS)
& ELECTRIC CO.,)
et al.,)
)
(Calvert Cliffs Unit 1 and)
Unit 2))
_____)

Docket Nos. 50-317 and 50-318
License Renewal

PETITION'S MOTION TO VACATE ORDER CLI-98-14

Petitioner National Whistleblower Center hereby moves the Nuclear Regulatory Commission (hereinafter, "NRC") to vacate and withdraw the August 19, 1998 Order Referring Petition for Intervention and Request for Hearing to Atomic Safety Licensing Board Panel, CLI-98-14 (hereinafter, "Order"). As explained below, the Order violates NRC regulations of the NRC, the Administrative Procedure Act, and the Atomic Energy Act.

INTRODUCTION

On August 7, 1998 the National Whistleblower Center, in accordance with the NRC's notice published in the Federal Register on July 8, 1998, filed a petition for leave to intervene in the above-captioned proceeding. On August 19, 1998 the NRC issued its

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Order. Part I of this Order (pages 1-2) referred Petitioner's petition to the Chief Administrative Law Judge of the Atomic Safety and Licensing Board Panel for the assignment of this matter to an Atomic Safety Licensing Board (hereinafter, "ASLB"). Where assignment to the ASLB is proper, the method of assignment and dictates imposed by the NRC is improper and must be vacated and withdrawn.

ARGUMENT

I. PART II OF THE NRC ORDER VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551-558, applies to actions taken by the NRC. 42 U.S.C. § 2231; 10 C.F.R. §§ 2.711(m) and 2.756. The Administrative Procedure Act mandates that this proceeding be conducted in a fair and just manner. The NRC is required under the APA to conduct this proceeding taking into proper consideration the "convenience and necessities of the parties or their representatives." Specifically, the APA sets forth the following requirement on the NRC:

In fixing the time and place of the hearing, due regard shall be had for the convenience and necessities of the parties or their representatives.

5 U.S.C. § 554(b).

Additionally, in licensing matters the NRC is mandated to conduct proceedings with "due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings" 5 U.S.C. § 558(c) (emphasis added).

Moreover, under the APA, the officer who presides at an adjudicatory proceeding is empowered to make various procedural decisions, including the regulation of the “course of the hearing” and the disposition of “procedural requests.” 5 U.S.C. § 556(c).

Part II of the Order violates the APA. It set forth time-constraints and a hearing schedule without taking into consideration the “convenience and necessities” of all of the parties. In fact, Part II of the Order was issued without any input from one of the parties and without any regard whatsoever for the interests of that party. Moreover, Part II of the Order dictates rules of procedure which are delegated by the APA to the ALB.

A. The Two and One Half Year Milestone is Improper

The NRC has directed the ALB to complete the license renewal proceeding and insure the “issuance of a Commission decision on the pending application in about two and one half years from the date the application was received.” Order, p. 2. This ruling is arbitrary, capricious and an abuse of discretion. At this stage of the proceeding, the NRC does not know the scope of contentions the Petitioner will file in this matter and is completely unaware of the factors that may require extending the proceeding beyond the two and one half year “goal.” Additionally, the NRC concedes that the NRC Staff has yet to file its Safety Evaluation Report (SER) and its Final Supplemental Environmental Impact Statement (FES). Mandating that the ALB institute a schedule to meet a fictional and factually unsupportable timetable is improper. Moreover, there is no recognition of the fact that this represents the first licensing renewal proceeding of its kind which will inevitably require the parties to litigate a host of unanticipated issues. This factor was

not considered by the NRC. Based on the proposed schedule, it would not be possible for petitioner to safeguard its procedural let alone substantive rights. The proceeding must proceed in a manner consistent with the “convenience and necessities of the parties,” and consistent with protecting the “rights and privileges” of the “adversely effected persons,” not to some fictional time-table which could stem from the current political climate faced by the NRC which happens to run counter to the rights and privileges petition must be afforded as a matter of law. 5 U.S.C. § 554(b) and 5 U.S.C. § 558(c).

In addition, setting a time-table, without first seeking input from the parties; without a factual record concerning the scientific matters which may be in dispute; without knowing the scope of the contentions; and without monitoring the progress of discovery, constitutes a violation of the APA and constitutionally protected fundamental due process rights of petitioner. For example, the APA authorizes the presiding official (i.e. the ALB presiding officer) to “regulate the course of the hearing” and “dispose of procedural requests or similar matters.” 5 U.S.C. § 556(c). By setting forth a complex time-table, and requiring the ALB to file detailed justifications whenever the time-table is missed, violates the level of discretion granted to presiding officers required by law. In fact, it is irrational and demonstrates a fundamental misunderstanding of due process.

It is almost inconceivable that at the commencement of a complex adjudicatory proceeding, the Commissioners, who are not conducting the proceeding, would issue a scheduling order without any input from the parties. It is even more irrational for that

body to set a time-table for the completion of the adjudication prior to the commencement of the proceeding itself.

B. The Scheduling Deadlines are Improper

After implicitly and improperly ordering that this proceeding terminate within two and one half years, the NRC next mandates a schedule which will insure that the Petitioner cannot properly participate in this proceeding.

Again, without any factual basis, without any on-the-record input from any party, and without knowing the nature or scope of any of Petitioner's contentions (and without knowing how much time the Petitioner may need to properly set forth contentions), the NRC declares that a "decision on intervention petitions and contentions" be issued "within 90 days" of August 19, 1998.

Next, the NRC completely ignores the due process requirements in its discovery order. First, the NRC ordered that discovery against the NRC Staff be "suspended until after the Staff completes its final SER and FES. Then, the NRC mandates that discovery against the Staff be completed "within 30 days of the issuance of the SER and FES." Order at 5. Thus, under the NRC's "guidance," discovery against the Staff on matters directly related to fundamental health and safety issued is limited to a 30 day period. What is remarkable about this mandate is that it was issued by the NRC without knowing what will be contained in the SER and FES, without knowing if those documents unto themselves will raise valid contentions and without knowing any of the scientific matters

which may need to be addressed. Moreover, there are no deadlines or time frames placed on NRC Staff's issuance of the SER and FES, with great resources, will have

The NRC next mandates that "pre-filed testimony" be submitted merely ten days after discovery closes. That deadline is completely impossible to meet and again is absurd. How can the NRC today know how long the parties will need to prepare pre-filed testimony in a complex matter which directly impacts on fundamental issues of public health and safety.

What is even more bizarre, is the fact that the NRC, prior to even the submission of proposed contentions, prior to discovery and to the NRC Staff's issuance of its SER and FES, mandates that the adjudicatory hearing in this matter be completed within a maximum 35 day period. Specifically, if the hearing commenced the day after the pre-filed testimony was submitted, and if the hearing proceeded seven days per-week, the maximum time period allowed for the hearing is 35 days. Setting this type of time period, at this stage in the proceeding, demonstrates a fundamental prejudice against the Petitioner by the NRC. This prejudice violates the APA.

Under the APA, this proceeding must be conducted with "due regard" to the "rights and privileges" of the Petitioner. 5 U.S.C. 558(c). It must be conducted with respect and attention to the "convenience and necessities" of the Petitioner. 5 U.S.C. 554(b). Moreover, the schedule mandated by the NRC violates that APA's provisions concerning the responsibilities of the presiding officer. 5 U.S.C. § 556(c)(5) and (9); 5 U.S.C. 557(d)(1)(E).

II. PART II OF THE NRC ORDER VIOLATES THE RULES OF PROCEDURE GOVERNING ASLB PROCEEDING

Part II of the NRC Order also violates the Commissions own regulations. The Commission is bound to follow its own regulations and any deviation from these regulations constitutes a violation of law. Again, the NRC's refusal to follow its own published regulations concerning this proceeding demonstrates prejudice and bias against the Petitioner.

The NRC Order violates the following provisions of the NRC's own regulations:

A. The NRC Violates 10 C.F.R. § 2.711(a)

In order to meet the illegal two and one half year schedule, the NRC mandated that the rules for "extensions of time" be arbitrarily changed. The NRC directed that the ASLB "should not grant requests for extensions of time absent unavoidable and extreme circumstances." Order at 6.

This provision violates the Commission's regulations set forth in 10 C.F.R. § 2.711(a). This provision authorizes the ASLB to grant extensions of time for "good cause." It is illegal and improper for the NRC not to follow the "good cause" standard. In addition, this change was done without notice or input from the Petitioner. It is illegal and cannot stand.

B. The Two and One Half Year Milestone and all of the scheduling orders violate 10 C.F.R. § 2.718

The Commission's own regulations require that this proceeding be adjudicated in a "fair and impartial" manner. 10 C.F.R. § 2.718. Again, as set forth in the section on the

APA, the arbitrary two and one half year deadline for this proceeding, and the bizarre and unfair deadlines set forth by the NRC, without any input from any of the parties, fails to meet the “fair and impartial” standard for conducting the hearing. The Order can amount to little more than the current predilections of the Commission, based on its preconceived notions of what contentions petitioner should be entitled to raise. Petitioner is entitled to an “impartial” rather than prejudicial tribunal and should have been heard before issuing the Order. The Order should be vacated.

C. The Order Violates 10 C.F.R. § 2.718(e) and (m)

The NRC Order improperly oversteps the authority granted to the ASLB by the Commission’s own regulations. Specifically, the NRC’s own regulations require that the ASLB “regulate the course of the hearing and conduct of the parties.” 10 C.F.R. § 2.718(e). Additionally, the regulations require that the ASLB take action consistent with the APA. 10 C.F.R. § 2.718(m). The NRC Order improperly interferes with this authority of the ASLB.

The Order sets forth a schedule for the proceeding, absurdly short deadlines for discovery, the filing of contentions and the conducting of a hearing. Additionally, the Order sets forth methods for service of process, standards for granting a continuance and a manner for counting the time requirements, all of which are inconsistent with the mandates of the NRC’s regulations.

These deadlines and procedural matters are not for the NRC to decide. The regulations grant the ASLB sole responsibility for regulating the “course of the hearing

and conduct of the parties” and require that these proceeding be conducted in a manner consistent with the due process requirements of the APA. 10 C.F.R. § 2.718(e) and (m). It is simply illogical and wrong for the NRC, which will not have the daily or weekly contact with the parties, to regulate the conduct of the parties. This type of procedure is, by common sense and Commission regulation, vested with the ASLB.

D. The Stay on Staff Discovery Violated the Law

The NRC, in its Order, issued a stay of discovery against the NRC Staff. Specifically, the Order stated that “formal discovery against the staff . . . regarding the Safety Evaluation Report (SER) and the Final Supplemental Environmental Impact Statement (FES) will be suspended until after issuance of these documents.” Order at p. 4. Additionally, the NRC ordered that “formal discovery against the NRC Staff should be suspended until after Staff completes its final SER and FES.” Order at pp. 4-5.

This aspect of the Order violated Commission regulations. Specifically, the regulations which are binding on this proceeding only grant the ASLB with the authority to limit discovery. 10 C.F.R. § 2.740(b) and (c). The NRC was without authority to issue this suspension of discovery. Under the controlling regulations if a party wishes to stay discovery against itself it must file a “motion” for relief and base that motion on “good cause.” 10 C.F.R. § 2.740(c). Petitioner would have the right to file an opposition to that motion and the ASLB would make the determination concerning the discovery. *Id.*

Again, the NRC has demonstrated bias in this matter. It has issued a stay against discovery concerning NRC Staff without any basis on-the-record. The Staff did not file a

motion for stay and none of the parties were permitted to respond to any such motion. This is particularly remarkable inasmuch as the framework envisioned by the Commission essentially grants Staff a period of 575 days to issue the SER and FES, while limiting Petitioner to 30 days to complete all discovery against Staff. It is doubtful that a meaningful review of a document as complicated as the SER and FES could competently be analyzed in a 30 day time frame.

Moreover, the Commission granted Staff a stay in violation of its own regulations and without having the slightest idea of the scope of the contentions Petitioner may seek to admit. How can NRC determine that the Staff needs a stay without even knowing what issues are going to be litigated?

Even more troubling is the issue as to how the Commission knew that Staff wanted a stay of discovery (and apparently also knew not to impose an arbitrary deadline on Staff's issuance of the SER and FES). This proceeding is required to be conducted on-the-record. It raises a major appearance of impropriety for the Commission to grant relief to parties who have not officially communicated any need or desire for such relief. Such conduct not only violated the Commission's own regulations, it clearly violated fundamental due process.

A. The NRC Order violated 10 C.F.R. § 2.740

In addition to improperly granting a discovery stay to the NRC Staff, the discovery schedule set forth in Part II of the Order violates 10 C.F.R. § 2.740. These regulations empower the ALSB's "presiding officer" the authority to "limit" discovery and police th

discovery process. 10 C.F.R. § 2.740(b). In fact, it is the “presiding officer,” not the NRC, which is required to initially handle all discovery matters. It was illegal and improper for the NRC to set forth limitations on discovery in its Order. Order pp. 5-6.

III. PART II OF THE NRC ORDER VIOLATES 10 C.F.R. § 2.714

In Part II of the Order, the NRC states that this proceeding is “limited to a review of the plant structures and components that will require an aging management review for the period of extended operation of the plant’s systems, structures and components . . .” Order, p. 2. This portion of the Order is illegal and was issued in violation of 10 C.F.R. § 2.714.

Specifically, 10 C.F.R. § 2.714 does not limit the nature or scope of contentions which a party may seek to admit in an ASLB proceeding. The regulation merely mandates that a petitioner file a “list of contentions which petitioner seeks to have litigated in the hearing.” 10 C.F.R. § 2.714(b)(1). In addition, a contention must set forth a material dispute of “law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). Thus, under the controlling regulations, Petitioner’s may propose contentions related to the renewal of Applicant’s license which beyond the “limited” areas review set forth in the Order. In fact, Petitioner’s have the right to legally challenge the limited nature of the “review” currently envisioned by the NRC through the ASLB process.

The NRC cannot, consistent with law and due process, limit the area or scope of Petitioner’s contentions. Petitioner has the right to file any contention which they

determine, in good faith, to be related to Applicant's renewal process. The NRC cannot, on its own initiative, prevent the filing of contentions and prejudice the ASLB with an illegal advisory decision. Further, the NRC cannot issue a ruling on the scope of the contentions until such time as the Petitioner has filed these contentions.

Moreover, the Petitioner maintains the right to file a contention legally challenging the various rules issued by the NRC which purport to limit the scope of this proceeding. It is improper for the NRC to issue a ruling upholding the legality of these rules prior to hearing from all of the parties and properly adjudicating this matter in a manner required by law.

IV. ALTERING THE STANDARD TO FOR THE ADMISSION OF BOARD ADMITTED CONTENTIONS IS ILLEGAL

Under the Atomic Energy Act, the statutory standard for admitting a contention in an intervener-initiated proceeding is based on a determination as to whether the contention is needed to "provide adequate protection to the health and safety of the public." 42 U.S.C. §2232(a); Commonwealth of Mass. v. NRC, 924 F.2d 311, 315 (D.C. Cir. 1991). In fact, any matter material to the public health and safety is, as a matter of law, admissible as a contention in a licensing proceeding. See Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

The standard for board admitted contentions set forth in Section II A of the Order is illegal. Specifically, there is no basis in law to limit Board initiated contentions to "extraordinary circumstances" or to limit the admission to "serious safety, environmental,

or common defense and security matters.” Additionally, the procedure governing the standard for board admitted contentions is inconsistent with the published regulations and would have a chilling effect on the Board’s willingness to sua sponte initiate a contention.

Given the experience, insight, and objective scientific expertise of members of the ASLBP, it is contrary to the interests of justice and public health and safety to place any limitation on board initiated contentions which are not explicitly provided for in 10 C.F.R. Part 2. In short, the Commission cannot set a new standard for admitting contentions contrary to law and regulations.

V. ADVISOR OPINIONS ARE ILLEGAL

Petitioner contends that, to the extent the Order is deemed advisory in nature, it is improper. Although under Section I the Order states that the Commission has only “suggested” a schedule for the completion of the schedule, this is not true. The Commission had dictated the schedule. “The Commission directs the licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about two and one half years from the date that the application was received.” This language is not advisory in nature. Likewise, Section III specifically states that the Commission “directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this order...” and at the end of Section II the Commission “directs” that the Licensing Board must “in writing” promptly state to the Commission why any single milestone could be missed by more than 30 days and provide the Commission with a written

statement of the measures the Board will take to restore the proceeding to the overall schedule. Similarly, the Commission directs that the Board “shall not entertain motions for summary disposition” unless certain conditions are met and that “regulations for responding to filings served by first-class mail or express delivery shall not be applicable” under other conditions. To the extent the Order is advisory in nature it should be vacated.

CONCLUSION

Part II of the Order demonstrates a bias against Petitioner which is in violation of the APA and Constitutionally mandated due process. Part II of the Order violates the legal requirement that the NRC afford Petitioner with “meaningful public participation” in this proceeding. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1441 (D.C. Cir. 1984).

The NRC may harbor political bias against the intervention process. However, under the provisions of the APA, the NRC’s participation in this proceeding cannot be biased by political considerations. This proceeding must be adjudicated, on-the-record, after every party has a full and fair opportunity to be heard. When participating in this proceeding, the NRC must set-aside its bias and sit as a judge. Part II of the Order demonstrated extreme bias against Petitioner. It prejudiced the appointed-ASLB by setting forth procedures which demonstrated the NRC’s hostility to Petitioner and the public adjudicatory process required by law. The NRC must not only vacate Part II of its decision, it must unequivocally reaffirm the provisions of the APA and 10 C.F.R. which require that the ASLB adjudicate this proceeding in a fair and equitable manner. The

NRC must insure that the chilling effect on Petitioner's due process rights caused directly and indirectly by the issuance of Part II of the Order be removed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The original of this petition was delivered, by hand, to the NRC's Public Document Room on August 7, 1998 and was further served on that date to the following persons, by First Class Mail:

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**BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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**Docket Nos. 50-317 and 50-318
License Renewal**

ASLBP No. 98-749-01-LR

August 21, 1998

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Vacate Order CLI-98-14 was served this August 21, 1998 on the following persons by First Class Mail:

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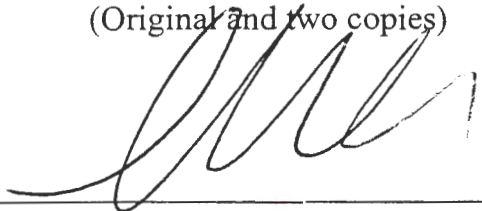
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